REMARKS

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WRIT OF HABEAS CORPUS.

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G. M. WHARTON.

SECOND EDITION.

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The importance of the great Constitutional question, involved in the assumed right of the President of the United States to deny the privilege of the Writ of Habeas Corpus to a person arrested under his authority, when in his judgment, in time of rebellion, the public safety requires that denial, cannot be over-estimated. The decision of the point, either by the highest judicial authority of the Union, or, what is sometimes more potent, by the prevalent sense of the community, will mark an era in the history of the Country and its Constitution, which will give tone to the opinions and practice of after times, and mould by traditionary influence the minds of posterity. The solution, in former days, of the doubt touching the right of the States to charter banks for the issue of paper money, and of that of the General Government herself to charter a bank for the same purpose, may be mentioned as instances of the controlling importance of questions of right made doubtful by reason of the Constitution being silent as to any express grant or prohibition of power; but which, when solved in either of the modes alluded to, become practically and as completely a part of our national charter as if expressly incorporated in it.

Any contribution, therefore, in the proper spirit, to the due consideration of such a question, before its final authoritative adjudication, should be welcomed, if not invited.

The recent semi-apologetic order of the Secretary of War, (February 14, 1862,) assuring us that "a favorable change in public opinion has occurred," and that the President is "anxious to favor a return to the normal course of the administration, as far as a regard for the public welfare will allow," may relieve some degree of apprehension for the future; but, coupled as it is with the assurance, that he intends to "except from the effect" of the order, persons "whose release at the present moment may be deemed incompatible with the public safety," is by no means an abandonment of the claim of power by the Executive, and is no atonement for a violated Constitution, if,

on investigation, it should be found that in the late course of the Government, power not sanctioned by its terms or spirit, has been exerted by the President.

The investigation should be as free as possible from the taint of party spirit.

Magna Charta says:

[We prefer in the discussion of a topic in which others than lawyers take an interest, the use of an English translation.]

"No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed—nor will *we* (it is the King who speaks to his barons) pass upon him nor condemn him, but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right."

(See Hurd on Habeas Corpus, p. 82. 1 Statutes of the Realm, 117.)

Of this principle of the Common Law of England, Mr. Binney well remarks, "It is a glorious principle," and he restates it in these emphatic words: "Exemption from discretionary imprisonment, without bail or trial, is, therefore, an undoubted principle of the Common Law."*

It would seem, therefore, to belong to us, as a part of our heritage. Mr. Binney thinks otherwise. Americans are not as largely indebted to the bold and generous nobles who extorted this concession from King John, as has been usually supposed. The benefit of the broad principle is confined to the comparatively contracted sphere of England.

But why should it not also be "a glorious *American* principle?" Did not our ancestors bring with them from England so much of the Common Law as was applicable to their circumstances in their new country? Is not this familiar doctrine? Does not Chancellor Kent say so in his twenty-fourth lecture, embracing the subject of the Habeas Corpus? Were not the glorious principles of freedom applicable to their circumstances here? Were the freemen of England to be universally exempt from discretionary imprisonment by any body, and the freemen of America left subject to arbitrary arrest? Mr. Binney would seem to be of this

* Mr. Fox had previously called the Habeas Corpus Act, "the glorious Statute," passed at the era "of good laws and bad government."

opinion, because he says that this principle of universal exemption "is too perfect for human society." So far from this being the case, we have hitherto supposed that exemption *from discretionary imprisonment* was the very basis of social liberty. Magna Charta does not pretend to exempt persons from arrest or imprisonment "according to the law of the land," but only from arbitrary or discretionary imprisonment, without process of law—that is—without judicial process. If this principle be too perfect, the opposite one of arbitrary arrest and detainer is much too imperfect for American social happiness or security.

But, fortunately, Americans are not left by the Constitution of their National Government, to theoretical arguments in favor of an exemption from Executive discretionary seizure of their persons. That instrument says: "Nor shall any person be deprived of life, liberty, or property, without due process of law."

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Are these principles of our Constitution less "glorious" than that promulgated by Magna Charta? Each of these immortal charters asserts the exemption of all persons from discretionary imprisonment, by forbidding deprivation of liberty unless by due process of law. Can it be then truly said that the English charter alone confers the right, and that the principle of English law, grounded on that instrument, is the exclusive property of Englishmen? Mr. Binney has substantially averred this, but has not averred it, after a professed comparison of the clauses just cited from the Constitution of the United States, with the thirty-ninth clause of Magna Charta; because it is a remarkable fact, that nowhere throughout his treatise, does Mr. Binney cite or allude to the former. He relies entirely upon his construction of the second paragraph of the ninth section of the first article, without commenting upon the language of the fourth and fifth articles of the amendments, parts of which we have quoted; and which, be it remembered, were adopted by the people for the very purpose of resolving supposed ambiguities in the language of the original instrument. And it can hardly be supposed, therefore, that any doubt arising under a clause in the latter, can properly be resolved

against the fair sense of an amendment, which embraces the same subject matter, and was intended to explain it.

Mr. Binney says, "We must discard English analogy." Why, we ask, when we are construing substantially the same words? When the Constitution speaks of the Writ of Habeas Corpus, whither shall we turn to find out what writ is meant? Our author states, "The Writ of Habeas Corpus, simply and without more, means the Writ of Habeas Corpus ad subjiciendum." Of course it does—but whence did he derive this meaning of the term? From the English law. What, then, becomes of the injunction to discard English analogy? Why retain English law, English language, and above all, English expressions which belong to the law, and, at the same time discard "English analogy?" The Supreme Court has said, in Exparte Watkins, 3 Peters, 201, that reference must be had to the Common law to ascertain the nature of the writ.*

He further asserts: "The Constitution of the United States must be judged by itself." Why, then, let us ask, take no notice of clauses which relate to the very subject matter in hand, and confine ourselves to a partial view of the instrument? And if we find, upon turning to them, that those clauses define the rights of the citizens in the same spirit, and substantially in the same words as those which illuminate Magna Charta, why say with Mr. Binney, that we are to judge our Constitution, "not by the English Constitution or by the powers of Parliament," and not rather say, we will adopt English analogy in construing language borrowed from an English source, and employed by our forefathers, in the assertion of the same rights of man?

Is there any less necessity of protecting the liberty of the citizen in the United States, than in England? There is, if we admit with Mr. Binney, adopting Bulwer's language, that our President "is the feeblest Executive, perhaps, ever known in a civilized community." If he is left alone in his feebleness, there should be no dread of a *lettre de cachet* from that quarter. The only fear would emanate from the direction of Congress, and the representatives of the people and of the States might safely be entrusted with the authorization of the exercise of this power. It seems, however, to us a very singular conclusion to extract from the admitted feebleness of the Executive, the position that, therefore, the President can wield discretionary power which the

*See the use made of the meaning of terms in the English Law, when incorporated into our Constitution, by C. J. Marshall, in his opinion in Burr's case, (4 Cranch, 471,) in commenting on the expression, "levying war."

King of England himself cannot exert. This is indeed "discarding English analogy" to some purpose, and adopting in its stead, Russian or Turkish analogy. But if the President has the discretionary power in question, *he is not feeble*, and Mr. Bulwer is wrong, and Mr. Binney is wrong; and then, indeed, the President needs no English analogy. American autocracy is all sufficient; and the President becomes, not the feeblest, but the most powerful Executive ever known in a republican community.

The present venerable and distinguished Chief Justice of the United States, in his decision in Merryman's case, places his conclusion against the rightfulness of the power claimed by the President, partly upon the intent of the Constitution, as exhibited in the restricted nature of his granted powers. Being invested with very limited authority in many cases, according to the very terms of the Constitution, it seemed a natural process of reasoning, in the construction of a doubtful clause of the same instrument, to rely upon its general tone and spirit. If the President, by admission, has little power in one case, he would seem to have but little power in another like case, unless some clear reason prominently presented itself for the particular exception. Mr. Binney objects to this train of reasoning, and answers it, first, by a sarcasm upon the Judge, which leaves the logic unaffected and furnishes no aid in our search after truth; and secondly, by the position that the weaker the Executive, generally, and in ordinary cases, the stronger he ought to become or to have power to make himself, in extraordinary emergencies; and this principle he thinks, is available to show that such was *the intent* of the framers of the Constitution. The limitations of his office, as he supposes, make the President the safest depository of discretionary power. But it may be suggested, what becomes of limitations upon power, where the discretion entrusted to the officer authorizes him to throw off the limitations? Does his weakness cling to him after he becomes strong? Is the Samson, with his shaven locks, the same feeble individual who, with his sprouting hair, and his giant arms, is able to tumble to the earth a mighty edifice?

Guards and limitations and checks upon power, in republican countries, are introduced into their Constitutions for extraordinary occasions. In peaceful times, with no popular passions excited, and no obstacle to prevent calm reason being listened to and duly estimated, there is far less practical necessity for such provisions. They stand out then but as sign-posts, pointing to the sanctuaries or places of refuge, when the political atmosphere shall be overcast, and the thunder of the tempest shall be heard.

When the Federal Constitution was adopted, the States, or many

of them, had their Habeas Corpus Acts. Even without a resort to England, the Convention which framed it, was familiar with their provisions. Massachusetts had hers of March 16, 1785; South Carolina hers of 1712;* Pennsylvania hers of February 18, 1785; New York hers of 1787. The Ordinance of Congress of July 13, 1787, referred to and confirmed the writ of Habeas Corpus as a familiar and existing provision of law. There was no such United States law then in existence, and the reference must have been either to the English statute, or to any State law whatever, indifferently; all of them being substantially the same in their provisions, and having one common object.

When the Constitution, therefore, was on its trial before the people, their common sense and natural sympathies recognized the allusion to the Writ of Habeas Corpus in the first Article, just as the common sense and natural sympathies of the old Congress recognized the meaning of the terms employed in the Ordinance of 1787. Everybody knew what a Habeas Corpus Act signified; and perhaps no one has expressed the idea better than C. J. Tilghman, when he said, (as in 1 Binney 377, Hecker v. Jarrett,) "The object of the Habeas Corpus Act was to protect the liberty of individual citizens; and the danger of oppression is not so great in civil matters as in cases of crimes or supposed crimes. Governments often magnify real crimes and sometimes impute offences falsely to innocent persons, for the purpose of oppression. From this quarter has generally arisen the danger to liberty."

Of course, every Government must have the power of self-preservation, and consequently of providing for emergencies. If the Constitution itself does not do this, the Legislature must be invested with the authority; and this is a natural portion of the legislative power. A Government must be made strong enough for all contingencies. The only question in the present case is, what branch of the Government has the needed, reserved power—*a generally weak* Executive, or a *generally strong* Legislature? To which of the two does the intent of the Constitution more naturally point? We reply, as C. J. Taney does, to the latter.

* This earliest of American Habeas Corpus Acts, that we have seen, is to be found in Brevard's Digest, vol. 1, page 401. It contains the following provision: "All and every person which now is, or hereafter shall be, within any part of this province, shall have, to all intents, constructions, and purposes whatsoever, and in all things whatsover, as large, ample, and effectual right to, and benefit of the said act, commonly called the Habeas Corpus Act, as if he were personally in the said kingdom of England." It had previously recited and re-enacted the Statute of 31st Charles II., C. 2, which was passed 33 years before. The phrase "benefit of the act," was contemporary with the famous Habeas Corpus Act itself.

In order to attain the true meaning of the Constitution in any selected portion, we should take it as it appeared when complete, and was presented to the people of the country for their assent or dissent; in the figure which it then bore, in point of arrangement, and in the dress which it wore, in matter of style. It is not right, because not conducive to its fair and full understanding, to spoil its orderly figure by taking it to pieces, or to strip it of its dress by presenting it as half made up, or as when it was in process of formation. The people, when they voted upon it, viewed it as a whole in the shape which it bore when submitted to them. The debates of the Convention which framed it, were not made public, and if they had been, would not have proved a certain guide by any means. The Constitution was to be construed as a perfected work, by the received rules of interpretation applicable to such instruments; and certainly, if any debates are to be regarded as valuable in throwing light upon its meaning, as recognized by the people of the country, they would be the debates in the Conventions of the different States which met for the purpose of ratifying or rejecting the proposed scheme of government. Mr. Binney has not presented us with any of these discussions. The prevalent tone of them regarded the restriction as one bearing upon Congress.*

The subject of discussion is part of the 9th Section of the first Article of the Constitution of the United States, which reads thus: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

A few remarks on the meaning of two of the terms here employed, may not be amiss.

First, of the word "privilege."

Mr. Binney asserts that the privilege "subsists in remedy." Indeed, that "the remedy is privilege." Is this exactly so?

The word employed is one well known to the law. We have, for example, "the privilege" of Parliament; "the privilege" of a freeholder; "privileges" as appurtenant to real estate, &c. In some of these cases, the word signifies *prerogative*, or *special qualification;* in others, *special incidental rights.* In the particular clause under discussion, it appears to mean *the security* or *protec-*

*See for a valuable syllabus of authorities on this head, the pamphlet of Tatlow Jackson, Esq., February, 1862.

tion, or *benefit* which the Writ of Habeas Corpus affords. This writ interposes the learning, independence, and integrity of the Judge, between the accused and his accuser, or the accused and the Government, if the latter has, through her Executive, ordered the arrest. This security or protection the Constitution guarantees, except in a special contingency, to every person in the United States.

The "writ" is the "remedy" against illegal imprisonment; the "privilege" of the writ, is the right to demand the security which it affords.

Mr. Binney dwells much on the history of the clause, and on the peculiarity of the word "privilege," used in it, and attaches great importance to the part taken by Mr. Pinckney, in its adoption. He takes the expression not to be one "of the Common Law, nor of Blackstone, its commentator, nor of Parliamentary Law." The truth seems to be, that Mr. Pinckney, and others who employed it, used the word as equivalent to "benefit"—the former, indeed, expressly so employed it on the 20th of August, 1787, when he brought his proposition again before the House. It must be remembered, that while the Constitutional Convention was sitting in Philadelphia, and was engaged in the consideration of the Habeas Corpus clause, the old Congress was also in session, and had before them the Ordinance for the government of the North-western Territory. No doubt the members of the two bodies were in frequent conference. Indeed, some gentlemen were members of both, and it is a supposition of the highest probability, that the same ideas were entertained by the members of each Assembly, with respect to a topic so important, and which had called forth no diversity of opinion. On the 13th of July, 1787, the famous Ordinance to which we have referred, was passed by Congress. It contains as part of the second among the Articles which "shall be considered as Articles of Compact between the original States and the people and States in the said Territory, and forever remain unalterable, unless by common consent," the following :—"The inhabitants of the said Territory shall always be entitled to *the benefits* of the Writ of Habeas Corpus, and of the trial by jury," &c. "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land," &c.

Privilege and *benefit*, then, were convertible terms. Strike down either, and you strike down the Act itself. Deprive a citizen of the old North-west Territory of the benefits of the Habeas Corpus Act, and you deprive him of the Act.

The Ordinance of 1787 further shows that the Continental Congress were quite aware of Magna Charta, and did not consider it

too perfect for the great Territory for which they were legislating, for they incorporated into its plan of government a literal translation of a part of it. Doubtless the expression in the Constitution, in connection with a similar clause, viz : "without due process of law," was considered as equivalent to "the judgment of his peers or the law of the land."

On this point it may be added, that the phrase "privilege of the Writ of Habeas Corpus" occurs very often in public documents in this country, before Mr. Pinckney employed it. We will cite merely the Constitution of Massachusetts, which went into operation on the last Wednesday of October, 1780, in the 7th Article of which it is provided that "*the privilege and benefit* of the Writ of Habeas Corpus shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious, and ample manner ; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months." (See Revised Statutes of Massachusetts, 1836, page 47.)

Next, as to the word "suspended."

Mr. Binney asserts that it signifies "hung up, deferred, delayed, denied for a season."

We agree that "suspended" does not mean "abrogated" or "destroyed," and that the definition of the word thus given, is as accurate as could well be desired. It is admitted, then, that neither Congress nor the President has power to *abolish* the privilege of this great writ. It can only be temporarily withheld from the people. Can even this be done, except by virtue of a statute ?

Mr. Binney argues thus :—The privilege of the writ is the individual remedy. The Constitution takes this away, for a season, when, in case of rebellion, the President thinks that the public safety requires it, and in pursuance of that opinion, orders the arrest of a particular individual. His privilege then is suspended, and the prisoner may be detained discretionally, in confinement, without bail or trial.

Is this Constitutional law in America ? Is it true, that in such cases, the privilege of the citizen is merely in suspense ? Is it not gone for ever ? By the very statement, does not the arrested person remain in confinement so long as the Executive chooses to keep him there, in conformity with his notions of public safety—and when he chooses to discharge the prisoner, does "the privilege" or "the remedy" revive ? Can he issue his Habeas Corpus after his discharge ? Surely not. The suspension covers the whole case of the individual. There is nothing more left of it.

"Suspended" by force of the term, means "suspended by law," and not suspended by an act done. The suspension is, of the right

to ask a particular protection, or of the benefit of that protection; and when that right is taken away for a definite period, no one, during the term of suspension, who is deprived of his liberty, can resort to it. When the term of suspension has passed, the right to apply for the Writ, or the privilege or benefit of the Writ revives; and any one in confinement, who has not been tried, may demand it, in order to bail or trial.

In every Constitutional question, especially when attention is drawn to a particular word, we should constantly bear in mind the rules which have been laid down for our guidance in such circumstances. Chief Justice Gibson said in Commonwealth vs. Clark, 7 Watts & Sergeant, 133: "A Constitution is not to receive a technical construction like a Common Law instrument or statute. It is to be interpreted so as to carry out the great principles of the Government, not to defeat them." Upon the same point, Judge Story remarks in his Commentaries, vol. 1, section 455: "A Constitution of government does not and cannot, from its nature, depend in any great degree, upon mere verbal criticism, or upon the import of single words." * * * "While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe, and, as has been already stated, that must be the truest exposition which best harmonizes with its design, its objects, and its general structure."

We are not only entitled then, but we are bound to regard the generally free tone and temper of the Constitution, as shown by its adoption of familiar and most significant phrases from English Constitutional documents; shown also, by the introduction into it, in the shape of amendments, and in order to relieve the doubt arising from the absence of their express annunciation in the text, of the broadest and most comprehensive statements of human rights under a political compact. If the technical meaning of a word or a clause stand opposed to the general spirit of the Constitution, the word or the clause must be modified accordingly.

We, therefore, argue thus:—The general right of the citizen is to be free from arrest, unless upon complaint against him made for a legal cause, supported by oath; and when thus arrested, he is entitled to bail and to a speedy trial by his peers for the offence charged. If this right be violated, any Judge, upon application by the accused, will enforce it, through the medium of the Writ of Habeas Corpus. This general right may be qualified by a temporary suspension of the protection of the Writ, or its temporary denial to any applicant for it. This denial to the citizen of the interposition of the judicial power in his behalf; this abrogation of

the Constitutional provision, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury," and "to be confronted with the witnesses against him," can only be grounded on some law which takes it away from him in terms, and follows the existence of that state of facts upon which the Constitution authorizes the denial to be pronounced—that is, the requirement of the public safety in case of rebellion or invasion.

Can the mere arrest pronounce all this? Does the fact that the Secretary of State, by telegraphic order to some agent, has seized a man, and sent him to a distant fortress, pronounce that invasion or rebellion exists—that the public safety requires the suspension of the privilege of the Habeas Corpus Writ—and that the person arrested has lost his privilege for a season? A mere arrest can hardly be so eloquent as this.

Mr. Binney contends that in England, "the Habeas Corpus *Act* is never suspended," and has never been "suspended for a moment," and that Blackstone, in asserting otherwise, "spoke loosely and inaccurately." He might have charged Mr. Justice Coleridge with similar looseness and inaccuracy; for that eminent man uses the same language more than once.

In note 13 to page 136, of the first volume of his edition of Blackstone's Commentaries, Justice Coleridge uses the following language: "The effect of *a suspension of the Habeas Corpus Act* is not in itself to enable any one 'to imprison suspected persons without giving any reason for so doing.' But it prevents persons who are committed upon certain charges from being bailed, tried or discharged *for the time of the suspension*, except under the provisions of the *suspending Act*, leaving, however, to the magistrate or person committing, all the responsibility attending an illegal imprisonment."

Mr. Binney might pronounce the same criticism on many Judges, and indeed, on the received language of the legal fraternity. This uniformity of expression, in speaking upon a particular topic, indicates uniformity of ideas, and is tolerably fair evidence that the common understanding is the true one. And, indeed, it appears upon examination to be so. The English Imprisonment Acts that have given rise to the form of expression to which Mr. Binney objects, and which authorize the commitment of certain persons to prison by virtue of warrants issuing by authority of the King, or of his Privy Council, and which deprive them, when so committed, of the privilege of bail or trial, in terms suspend, for a limited season, the operation of any statute of which the prisoners could otherwise avail themselves. The statute referred to in these va-

rious Acts, is none other than the Habeas Corpus Act; and there seems, therefore, very reasonable ground for styling an Imprisonment Law, a suspension of the Habeas Corpus Act, and for relieving the famous English Commentator, and his equally famous annotator, from the charge of looseness and inaccuracy.

The extracts which follow from the Statute of 57 Geo. 3, ch. 3, to be found in the 25th vol. of Statutes at Large, page 2, may be cited as specimens of the phraseology of these Acts of Parliament. The preamble to that Act recites:—"A treacherous conspiracy for the purpose of overthrowing by means of a general insurrection the established Government," &c.; and then it is enacted, that all persons in prison by warrant of the Privy Council, or one of the Secretaries of State, for High Treason, suspicion of High Treason, or treasonable practices, "may be detained in safe custody without bail or mainprize, until July 1, 1817," and no Judge, &c., shall bail or try any such person, until July 1, 1817, "any law or statute to the contrary notwithstanding."

"Provided always, that from and after the first day of July, 1817, the said person so committed, shall have the *benefit and advantage* of all laws and statutes in any way relating to, or providing for, the liberty of the subjects of this realm."

The next Proviso saves the ancient *rights and privileges of Parliament;* and another provides for the trial of any person or persons in prison at the time of passing the Act, against whom a bill of indictment had been already found. There is thus no interference with the regular course of justice in these latter cases.

The judicial power of the Union extends to all cases arising under the Constitution and laws of the United States. The applicant to the judicial power demands a Writ, which is emphatically one of right and not of grace. Why shall he not have it? Does the mere fact that he is under arrest—the very fact that entitles him to the Writ—deprive him of it? Surely not, without more—for no part of the judicial power can be used by the President or any one acting under his Executive authority. The Writ, then, must issue. The privilege of having it, of course, exists; and equally, of course, a return to the Writ setting forth the cause of detainer, must be made along with the production of the body of the detained person.

The chief difficulty, however, remains. The return may set forth, that the petitioner is kept in custody by an order of the President for his arrest, which, in his discretion, that high officer has issued, inasmuch as a rebellion exists in the country, and the public safety, in his judgment, requires the suspension of the

privilege of the Writ in the particular case; but it may omit to set forth the charge of the commission of any act constituting an offence against the laws of the United States. Is such a return lawful and constitutional?

It implies, we submit, in the strongest way, that the judiciary has no power to decide upon the constitutionality of an act of the Executive restraining the liberty of a confined person and to give adequate redress, inasmuch as the Writ of Habeas Corpus is the only mode by which, in such a case, a person can be restored to his liberty. Deprive him of the Writ, and he remains in confinement, because he has no legal mode of getting out.

Attorney General Bates meets this difficulty, by claiming for the President a coequal authority with the Judiciary to interpret the Constitution in what regards Executive powers. As Mr. Binney neither "affirms nor rejects" the argument of the Attorney General, he does not prefer such an answer to the question above propounded—and it is supposed that he would scarcely do it, inasmuch as the position would apparently be contrary to his expressed opinions, and to the whole course of judicial decision in our country. A position such as that taken by Mr. Bates, would deny the power of the Judiciary to pass upon the constitutionality of acts of the Legislature, and disturb our whole system of Constitutional Law. The President, therefore, would not be asserted by Mr. Binney to be uncontrolled in the construction of his own powers, and to have legally as well as substantially all such as he might honestly think were placed in his hands by the Constitution. On the contrary, Mr. Binney thinks that the power in dispute is one which that instrument in reality confers on the President.

It must not be forgotten, that the question does not respect the military power of the President, as Commander-in-Chief of the Army and Navy, in time of actual war. Mr. Binney expressly disclaims that consideration, and does not found his argument upon it. He treats the point as one relating to the power of the President, derived from the language of the Constitution and from the nature of his office. There can be no doubt that, when war, either foreign or civil, exists, its usual incidents must attend it, and that the civil law will necessarily be hushed and drowned in the great cry of arms. Within the theatre of war,* where the tribunals are closed, and against men in military array, martial law must have its sway—and no man ought to complain, that in a national strife, where the Government is fighting for its existence, its territory, or its honor, the law of war should supplant the

*See, on this point, what Justice Woodbury says, in Luther *vs.* Borden, 7 Howard, 33, and the authorities cited by him.

ordinary rules of justice. Even that law, however, has its course, which conduces to fair-dealing and equity, and a trial, that seldom fails to be speedy enough, and is generally public, usually follows arrest or capture. As Congress alone can *declare* war, or, for any length of time, recognize its existence, and can alone provide for its support and continuance, by acting in either way it gives its assent to the condition of things which attends such a state of society, and adopts its ordinary rules. If the Courts undertake to interfere with the military power in its proper exercise, and to handle prisoners of war, their intervention is irregular; and it is a sufficient return to a Writ of Habeas Corpus, issued in such case to say, that the party is held as a prisoner. The question is a widely different one in places outside of the area of war, where the Courts of justice are sitting, and publicly administering their functions, and every opportunity is afforded both for the prosecution and defence of persons charged with crime; and it is still further distinguished, where it concerns the civil power of the President as defined and conferred by the Constitution.

The second paragraph of the 9th Section of Article 1, like the other paragraphs of that section, contains no grant of power to anybody. It is a *restriction* on power, either expressly or impliedly given elsewhere. The 8th Section is affirmative—it *confers* certain and very large powers on Congress, which, without the restrictions of the 9th Section, might well cover the subject matter of the latter. For instance, the third paragraph of the 8th Section gives power to Congress to "regulate commerce"—the first, "to lay and collect duties"—in order, then, to restrict this general authority, the first paragraph of the 9th Section forbids Congress, prior to the year 1808, from prohibiting the importation "of such persons as any of the States now existing shall think proper to admit"—that is, negro slaves. So, in reference to the particular point we are discussing. Several paragraphs of the 8th Section authorize Congress "to declare war"—"to make rules concerning captures on land and water;" "to raise and support armies;" "to provide for calling forth the militia to *execute* the laws of the Union, *suppress insurrections* and repel invasions," and "to make all laws which shall be necessary and proper for carrying *into execution* the foregoing powers;" and then immediately follows the restriction of the 9th Section: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

On what and whose power is this restriction operative? On the President's? Show us the general grant of power to the Execu-

tive, which covers the subject matter of the restriction, and which, without this, would leave the power to him.

What are the President's powers? They are enumerated in the second Article of the Constitution.

The chief of them—and indeed, that which embraces all the rest—is contained in the clause: "The *Executive* power shall be vested in a President of the United States of America." It can be safely affirmed that there is no clause, nor intimation in any clause, which authorizes any "suspensive" power to be exercised by the President. He may "recommend to the consideration of Congress such measures," for their adoption, "as he shall judge necessary and expedient;" but his whole power in reference to laws already in existence, is to "take care that they be faithfully executed." His duty is to carry into execution legislative enactments, not to interfere with them in any way. An express law—the 14th Section of the Judiciary Act of 1789—authorizes the Judges of the United States Courts to grant Writs of Habeas Corpus. Can the President suspend this law?

How stands it, however, with Congress in this respect? Says the Constitution: "All legislative powers herein granted shall be vested in a Congress of the United States," &c.

Any *legislative* power, which exists under the Constitution, is therefore vested in Congress.

Is the suspension of the *privilege* of the Writ of Habeas Corpus properly a legislative or an Executive act?

We have quoted above the clauses which give to Congress the power of legislation over the subject of war, insurrections and invasions—they cover the whole of those subjects. Congress has the further powers "to provide [that is, by *law*, because Congress can only "provide" in this mode] for the common defence and general welfare of the United States,"* and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or *in any department or officer thereof.*"

If any law be at all necessary to enable the President to execute any power, Congress must pass it, or the President cannot execute the power.

If any law be at all necessary to prevent the award of a Writ of Habeas Corpus, Congress must pass it, or the Writ cannot be refused to an applicant.

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* It is not intended by this reference to rely upon this clause as a grant of power distinct from that of laying and collecting taxes, duties, imposts, and excises.

How, then, stands this part of the case?

We have, as to both the President and Congress, no grant of power in this particular paragraph, unless we do, as Mr. Binney does, undertake to "supply an ellipsis," which is unwarrantable, *except the suspending power would fail of its exercise by reason of the absence of any other distinct authorization.* In such case, we might properly supply an ellipsis. But if there are other grants of power in the Constitution, which embrace this suspending power, then, unquestionably, there is no necessity of supplying any supposed omission in the Habeas Corpus clause, in order to attain the object. Now that there are such grants of power, in language amply sufficient to vest the discretion over the subject matter in Congress, we think may be safely asserted by any one reading the clauses conferring upon Congress legislative power in the several particulars which we have recited above.

Mr. Binney does not profess to place his argument upon any alleged power in the Executive to abrogate or modify a law, and he therefore grounds it upon the supposed grant in the Constitution of the power to the President, as set forth in the disputed clause itself. He supposes no law to be necessary in the matter, and that no law can be made to interfere with the Presidential right under the Constitution. We have seen that the clause contains no grant at all, and is but a restriction upon somebody's supposed or granted power, and it is therefore attempted to sustain the inference in favor of the Executive right, from the nature of the Presidential office.

Undoubtedly it is a proper part of the duty of the Supreme Executive Magistrate, in time of lawful war, to direct the operations of fleets and armies, though Congress has the power to make rules concerning captures, and for the government and regulation of the land and naval forces. It is also the duty of the Executive, in his civil capacity, to cause the laws to be duly executed—we mean such laws as require any execution outside of the Judiciary—and are not merely declaratory statutes. It is as undoubtedly, however, no part of the office of an American Chief Executive to suspend, at his discretion, the privileges of the humblest citizen, whether arising from Common or Statute Law. The poorest man that walks has an equal right with the proudest, to the full protection and enjoyment of the Constitution and laws. It is, or has been, the boast of American liberty, that the rights of the citizen were clearly defined, and placed far above arbitrary estimation or interference. It has been the boast of Americans that the privilege of the Habeas Corpus, so called, because wrung originally from unwilling despots, had become a right, and that therefore a

nomenclature true enough in its origin, had lost its original meaning, and represented in our country one of the firmest possessions of freemen. Mr. Binney has labored hard to correct these visionary assumptions, and by tearing us away from British analogies, and by cutting us loose from Magna Charta, and by trying to persuade us not to strain after an unattainable perfectness, nor to reach towards the mark of our high calling as a free nation, to place us on the platform of the monarchies of the European continent, and to make us satisfied with our position there. If he has succeeded in convincing the judicial mind of the country that such is really our political latitude, it must be but a melancholy satisfaction to him, for he will have attained his desire, after dashing to the ground many a fond hope and marring a very beautiful picture.

But he will not succeed without also overturning judicial precedent. Mr. Binney supposes that the question has never been authoritatively decided. The venerable names of Marshall, Story, and Taney rise up instinctively to the mind of the reader, as he lights upon this opinion—but they are brushed away with the remark, that the points they are supposed to have decided, were never sufficiently considered, or "perhaps argued at all," by them. The dictum of C. J. Marshall, in Exparte Bollman, 4 Cranch 104, was uttered at a critical period of our country's history, and he was a man full of the spirit of the Constitution, and knew the views and could understand the language of its framers, perhaps better than any of his contemporaries. Of him and of Story, as they are both gone from us, it may be said, that his opinion on a constitutional question is itself an argument; and well, therefore, might the present Chief Justice of the United States rely upon what fell from each of those distinguished men, as an authority for his own decision. That is the latest and the most elaborate—and its clear yet simple statement of the law will, we trust, stand the assault even of the learning and ability which are brought to bear against it, and which are unhappily aided by the powerful political feeling of a dominant party in our country.

It is not a light matter to disregard those deeply seated feelings in favor of liberty, which may be said to be traditional with us. Mr. Binney admits the existence of a "bias" against his views. We should rather denominate it an instinctive American sentiment. Its expressions lie scattered over our old and our new State Constitutions, and our Bills of Rights. It crops out in opinions from Judges, and in the common speech of the Bar, and is an explanation of the startling surprise, not unaccompanied with dread, which attended the announcement of the first exercise of this power of arbitrary arrest by the present Executive. The fact of existing

insurrection in parts of the country, furnished to the student of Constitutional law, no excuse for the assumption of extra legal authority by the President, for he knew that the frame of Government of the United States contemplated the contingency of war and rebellion, and provided for it; and he knew also, that the Constitution had been practically tried in former days upon the very point of danger, and had happily stood the test.

The writer of these few remarks is one of those who is ardently attached to the Union of the States, and trusted that the Federal Constitution, which was the bond of that Union, would come unscathed even out of the present fearful contest.

PHILADELPHIA, *February*, 1862.